IN THE

Supreme Court of the United States

October Term 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,
v.
DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI
To the Supreme Court of the State of Washington
BRIEF FOR THE PETITIONER

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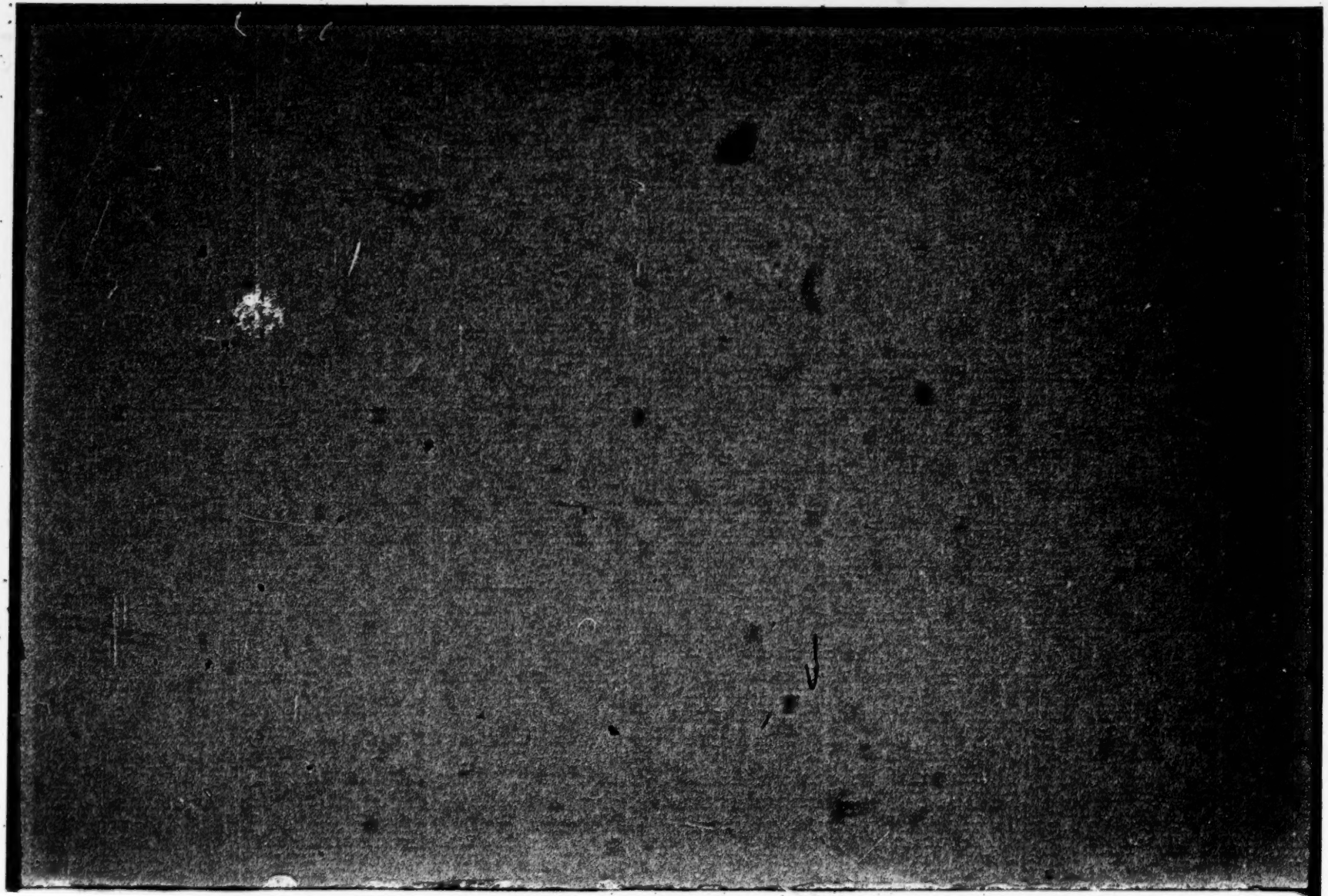

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lands that were alienated by the allottees did not convey fishing rights as these were tribal rights not invididually owned by the allottees (A. 193).

The tribal fishing right reserved to the Indians was the right to catch fish by nets or otherwise in Commencement Bay and the Puyallup River, the usual and accustomed grounds and stations. Hook and line type fishing was never employed as the catching of fish by this method is extremely inefficient from the standpoint of a people dependent upon fish for their livelihood.

The fish to which the exercise of the tribal fishing right reserved to the Indians by the Treaty applies are salmon and steelhead. These anadromous fish hatch in the fresh water of the Puyallup River, migrate downstream to the salt water of Puget Sound and then on to the Pacific Ocean where they grow to maturity, and then return to the stream where they were hatched to spawn their young by laying and fertilizing eggs in gravel beds. To maintain continuous runs of fish to the river so that runs of fish would not eventually be reduced due to insufficient breeding stock and at the same time not overstock the river it is necessary that a certain number of fish be allowed to escape and return to spawn. After spawning the adult salmon die, the steelhead do not. A return of at least 1% of the adult fish is necessary to assure sufficient spawning by natural means to preserve and assure continuous runs (A. 177).

Two basic factors have caused a decline in the number of fish necessary for natural spawning of fish in the River and a decline in the number of fish which survive after spawning to migrate to salt water. These are: (1) the

changed condition of the River's spawning grounds; and (2) the increased commercial and sports fishery.

(1) *The Condition of the River's Spawning Grounds.*

At the time of the treaty the Puyallup River flowed peacefully into Commencement Bay; there were no dams on the river, no factories, no lumber mills, no logging operations, no commercial and industrial developments, no municipal sewage—nothing such as exists today. This clear, clean and unobstructed virgin River has been completely changed by the encroachment of the non-Indian civilization. The channel of the River was altered artificially and straightened; Mud Mountain Dam was erected on White River, a major river that flows into the Puyallup; gravel was removed from the spawning beds; logging exposed spawning areas to excessive sunshine, and mud and silt due to the resulting erosion from the denuded hill areas buried gravel beds necessary for spawning; large quantities of water were taken from the River and its tributaries for irrigation, hydroelectric power and industry; and the purity of the water has been befouled by the large quantities of waste material dumped into the River and its tributaries from municipal sewer outlets and industrial waste. A graphic illustration of the disastrous effect of modern civilization upon rivers as natural fish spawning areas is indicated by the sketch set forth in respondent department of fisheries publication, 73rd Annual Report for 1963, Page 48 and 49 (A. 200). These changes have adversely affected the spawning areas and have caused a substantial mortality in the number of fingerlings that are hatched.

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The memorandum decision of the trial court is unreported and is printed on pages 11 to 30 of the Appendix. The opinion of the Washington State Supreme Court is printed on pages 39 to 68, of the Appendix, and is reported in 70 W.D.2d, p. 241 (1967). The remittitur by the Washington State Supreme Court to the Pierce County Superior Court is printed on page 68 of the Appendix. The Pierce County Superior Court, in its ministerial functions in compliance with the remittitur, entered the amended injunction which is unreported and is printed on page 69 of the Appendix.

JURISDICTION

The opinion of the Washington State Supreme Court was filed on January 12, 1967 (A. 39), and became a final judgment of said court on March 13, 1967 (A. 68). The remittitur issued March 15, 1967 (A. 68). The Pierce County Superior Court in its ministerial function entered the final order (amended injunction) pursuant to the direction of the Washington State Supreme Court on June 2, 1967 (A. 69). The Petition for Writ of Certiorari was filed on June 12, 1967, and was granted December 18, 1967. The jurisdiction of the court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Can the State of Washington by the exercise of the police power regulate rights reserved by Indians in treaties with the United States? If such power exists, what, if any, are the limitations of the State's power to regulate?

2. Do the courts of the State of Washington have jurisdiction to:

(a) hear an action against an Indian Tribe without the consent of the Tribe or the United States Government?

(b) determine that an Indian reservation does not exist where such reservation was established by treaty and never terminated by Congress?

(c) determine the extent of the rights, privileges or immunities of an Indian's or Indian Tribe's Treaty with the United States Government with respect to fishing and further to affirmatively limit such rights, privileges, or immunities to the same extent that all other citizens are limited.

3. Is the use of an injunction constitutionally valid to prohibit future criminal actions by an organization and its members and particularly where all of the members are not before the court? Is the use of the injunction justified under the circumstances of this case?

THE TREATY AND STATUTES INVOLVED

The Treaty involved is that certain treaty known as the "Treaty of Medicine Creek." It is published in 10 Stat. at p. 1132, (A. 69).

STATEMENT OF THE CASE

1. Pleadings and Prior Proceedings

The State of Washington in its complaint alleged that the Puyallup Tribe claimed special privileges and immunities from the application of state conservation laws and regulations to which it was not lawfully entitled. It asked the court to declare these claimed privileges and immunities void, and asked that the Tribe be permanently enjoined from destroying the fish runs in the Puyallup River (A. 5). The Tribe answered by denying the court had any jurisdiction over the persons or subject matter of the action and asserted that it was exercising its rights under the Medicine Creek Treaty of 1854 (A. 8).

The trial court, after trial, found that the Puyallup Indian Tribe did not exist, that the Puyallup Indian Reservation did not exist and that the state laws and regulations were reasonable and necessary to preserve the

fishery (A. 30). The trial court then issued an injunction prohibiting the Tribe from fishing in Commencement Bay and the Puyallup River contrary to the laws and regulations of the State of Washington (A. 37).

The Supreme Court of the State of Washington affirmed the trial court in all respects, except it ruled that the court had no jurisdiction to determine the nonexistence of the Puyallup Tribe and that the injunction was too broad. The State Supreme Court ordered the trial court to limit its injunction to those regulations that were reasonable and necessary to the preservation of the fishery (A. 39). The trial court, in its ministerial function, subsequently modified its injunction pursuant to the State Supreme Court's direction and prohibited net fishing by the Tribe (A. 69).

2. Statement of Facts

On December 26, 1854, at the request of the United States government, the Puyallup Indian Tribe and the United States government entered into the Medicine Creek Treaty (10 Stat. 1132) (A. 69).

Under Article I of this Treaty, the Puyallup Indian Tribe ceded and relinquished to the United States government all its right, title and interest to thousands of acres of land. In Article II of the Treaty, the Puyallup Indian Tribe reserved as a reservation a tract of land located in the Puyallup River Valley. The essence of this Treaty was that in consideration of the Puyallup Indian Tribe ceasing hostilities and relinquishing its vast land holdings, the United States government reserved to it the exclusive possession and use of the Puyallup Indian

Reservation and further the right to fish at all usual and accustomed grounds and stations outside the reservation. This right to fish at the usual and accustomed grounds and stations and within the boundaries of the Reservation was a vital and essential part of the Treaty (A. 183) and was carried out by the use of nets, weirs and traps (A. 182).

Immediately after the signing of the Medicine Creek Treaty, the Puyallup Indians ran into difficulty exercising their treaty fishing right due to an improper survey by the United States government which had removed from the reservation the frontage on Commencement Bay. A strong protest was made by A. H. Milroy, Superintendent of Indian Affairs, Washington Territory to Hon. Comm., Indian Affairs, Washington, D.C., letter dated March 20, 1873 (A. 193). In response to this letter which set forth the importance of the fishery to the welfare and existence of the Puyallup Indians, President Grant signed an executive order on September 6, 1873 which confirmed the reservation to the Puyallup Indian Tribe of one mile of water frontage on Commencement Bay and the entire mouth of the Puyallup River (A: 77).

In 1887 the General Allotment Act was passed (24 Stat. 388). The Puyallup Indian Tribe acting thereunder set aside to the members of the tribe certain tracts of land in the form of allotted land. Subsequent federal laws were enacted authorizing the allottees to alienate these lands. Large portions of these allotted lands were never alienated and are presently owned by the Indian children and grandchildren of the original allottees. The deed for

(2) *The Increased Commercial and Sports Fishery.*

The salmon and steelhead runs to the Puyallup River as to other rivers of the State of Washington are subjected to an immense non-Indian commercial and sports fishery, the intensity of which could not be imagined at Treaty time. Both the increase in the number of fishermen and the increase in the number of boats and the efficiency of the equipment employed by both salmon and steelhead fishermen have contributed to a decrease in the number of fish which return to spawn.

That the total Indian fishery throughout the State of Washington does not contribute in any substantial manner to this decrease is indicated by the statistics of the respondent department of fisheries published in 1963 in its 73rd Annual Report, page 127 (A. 201), which states as to the pink salmon run that the Indian fishery accounted for only 8.7% of the total catch in Puget Sound. This percentage figure does not take into account the total commercial catch in all areas and the nearly half-million pink salmon taken in 1963 by sports fishermen. Other statistics in this same publication prepared by respondent department of fisheries indicates that the total Indian fishery for other species of salmon do not exceed this percentage figure which shows that over 90% of these fish are netted by non-Indian fishermen.

At the time this action was commenced in the trial court, the total Puyallup Indian catch of steelhead and salmon amounted to only about 3% to 5% of the total fish catch from the Puyallup River anadromous fish runs (A. 28).

The Puyallup Indian tribe fished openly with nets and other ancient tribal methods without interference until the 1920's. In the 1920's, the State of Washington embarked upon a policy of prohibiting Indian fisheries not only within the exterior boundaries of the Puyallup Indian Reservation, but also as to their usual and accustomed fishing grounds (A. 189, 190). As a result the Indians commenced fishing at night to avoid interference by the State with the exercise of their treaty rights. In 1953 the Puyallup Indian Tribe openly challenged the state's right to prohibit fishing at which time Robert Satiacum was arrested for violating the fishing rules of the respondent department of fisheries. This criminal action resulted in a dismissal in the court below and the State appealed. In the case of *State v. Satiacum*, 50 Wn.2d 524, 314 P.2d 400 (1957), a divided court affirmed the dismissal and thereafter the Puyallup Indians exercised their Treaty fishing rights on the Puyallup River and at their usual and accustomed fishing grounds without state harassment. The State of Washington thereafter spent considerable effort preparing another case against the Indians. This time the action was brought in the form of a civil action enjoining the Puyallup Indian Tribe and Robert Satiacum from doing any net fishing in the Puyallup River or Commencement Bay. The state was granted an immediate injunction based on affidavits that were submitted to the Court, which complaint, injunction and affidavit were then served upon the Puyallup Indian Council and Robert Satiacum. The injunction was granted on the 12th day of November, 1963 (A. 7, 8). The injunction completely prohibited any Puyallup Indian from fishing in the Puyallup River and Commencement Bay. In February of 1966, a

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three-week trial was had which was concluded with the trial court entering a permanent injunction enjoining the Puyallup Indians from fishing with nets in the Puyallup River and Commencement Bay, which in effect has enjoined any type of Indian fisheries within the exterior boundaries of the Puyallup Reservation and their usual and accustomed fishing grounds. An appeal was taken to the Washington State Supreme Court. While said appeal was pending, Robert Satiacum, the defendant who had been acquitted by the Washington Supreme Court in the prior decision of *State v. Satiacum*, was found guilty of contempt of court and was punished by imprisonment for 60-days in the Pierce County Jail.

The State Supreme Court held the injunction was too broad and ordered the trial court to limit its injunction to those regulations which were reasonable and necessary for the preservation of the fishery. The trial court thereupon entered its order in accordance therewith permanently and totally enjoining any Puyallup Indian from exercising the tribal fishing right in any manner within the exterior boundaries of the Reservation and at all usual and accustomed grounds and stations located at Commencement Bay and the Puyallup River.

SUMMARY OF ARGUMENT

I. The Restrictions Imposed by the Court Below Upon the Exercise of the Treaty Reserved Fishing Rights of the Puyallup Indian Tribe Are Invalid as They Are Beyond a State's Power to Regulate.

A. Validity of the State's Restriction of the Exercise of the Treaty Fishing Right at "Usual and Accustomed Grounds and Stations."

The Indian petitioners have rights reserved to them by a Treaty with the United States to catch fish by netting for them according to immemorial tribal custom in Commencement Bay and the Puyallup River, their "usual and accustomed grounds and stations." The Indians have been exercising these rights at these places for over One Hundred (100) years.

Through commendable self-imposed restraint they have never abused these rights and were taking only about three to five percent (3% to 5%) of the total catch of the anadromous fish runs of the Puyallup River at the time they were permanently and totally enjoined from netting fish at their usual and accustomed grounds and stations. The non-Indian State of Washington "regulated" commercial and sports fishery are responsible for the remaining ninety-five to ninety-seven per cent (95% to 97%) of the total catch of fish from the River. These figures are not in dispute as they were so found by the trial court which heard all of the evidence and stated on Page 22 of its Memorandum Opinion (A. 28).

> "The evidence indicates, however, that the Indian catch of salmon and steelhead is only about three to five percent (3% to 5%) of the total."

Despite the small percentage of fish being netted by

the Indians, the respondent departments promulgated regulations completely prohibiting the Indians from netting fish.

The Court below held that the regulations of the respondents departments which completely prohibit the Indian petitioners from netting *any* fish at their usual and accustomed grounds and stations met the test of validity because they were "reasonable and necessary for the conservation of the fishery" (A. 39). In manufacturing its "reasonable and necessary for the conservation of the fishery" test the Court below also rejected the "indispensable" test laid down in *Maison v. Confederated Tribes of Umatilla Reservation*, 314 F.2d 169 (C.A. 9th, 1963) as "completely unworkable."

The factual pattern of the instant case fully illustrates why the "reasonable and necessary test" manufactured by the Court below is invalid, totally unworkable and without legal precedence. The factual pattern against which this "test" has been cast is as follows: The respondent departments' regulations in effect divide the total fish runs from the Puyallup River into two (2) groups. The ninety-nine percent (99%) "nettable" group and the one percent (1%) "non-nettable" group or brood-stock group which must be allowed to go back up the River to spawn if the fish runs are to be maintained. The only fish the regulations allow to be caught by nets are in this ninety-nine percent (99%) group and all netting for them must occur outside the entrance to Commencement Bay which is outside the exterior boundary of the "usual and accustomed grounds and stations" where the Indians have a treaty right to net fish (A. 176, 177). The only fish from

this ninety-nine percent (99%) "nettable" group which are allowed to remain alive to enter this area are the quota figured to be taken by sports fishermen. As the only fish left after the commercial netting and sports fishing are taken care of is the one percent (1%) non-nettable "brood-stock," the fish allowed to be caught by the Indian petitioners in the exercise of their Treaty rights are non-existent.

Petitioners contend that the "reasonable and necessary to the conservation of the fishery" test of the court below allows the respondent departments to manipulate the taking of fish so that all the fish that can be taken without endangering "brood-stock" are taken by non-Indian commercial and sports fishermen. The states own witness, Dr. Hamilton testified that who took the fish or where they were taken was a social or political affair (A. 178). Thus, each court using this test would be compelled, as the Court below apparently was, to hold that as the only fish left are brood-stock, the regulations prohibiting the Indians from netting them are "reasonable and necessary to the conservation of the fishery" and are thus valid. This is what happened in the instant case even though the Indian fish catch amounted to only about three percent to five percent (3% to 5%) of the total catch.

The "indispensable" to the conservation of the fishery test set forth in *Maison v. Confederated Tribes of the Umatilla Reservation*, 314 F.2d 169 (C.A. 9th, 1963) (A. 201) is not susceptible to this administrative manipulation. Under this test, the respondent departments would be required to allow for a sharing of the fish by reducing the catch of the non-Indian commercial and sports fishermen by about three percent to five percent (3% to 5%)

margin, which is about the percentage of the total catch taken by the Indian petitioners.

The Indian petitioners submit that the adoption by this Court of the "indispensable" test of *Maison v. Confederated Tribes of the Umatilla Reservation* or a similar test or standard would allow for the exercise of the fishing rights reserved to them by a solemn Treaty with the United States with only a small reduction in the ninety-five to ninety-seven percent (95% to 97%) of the catch being netted and caught by non-Indian commercial and sports fishermen.

B. Validity of the State Restriction of the Exercise of Treaty Fishing Rights Within the Exterior Boundaries of the Reservation.

The exercise of the Treaty fishing rights of the Indian petitioners within the exterior boundaries of the original Puyallup Indian Reservation is not subject to any restriction by State regulations. *United States v. Winans*, 198 U.S. 371 (1905); *Moore v. United States*, 157 Fed. 2d, 760 (9th Cir. 1946).

The Court below in order to impose State regulations declared that the Puyallup Indian Reservation was abolished and the Indian petitioners had no Treaty fishing rights to fish thereon because it was once a reservation.

This Court has continuously held that only the Congress has the power to abolish or constrict the boundaries of an Indian reservation, *United States v. Celestine*, 215 U.S. 278 (1909); *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962). Allotment of land in severalty pursuant to allotment acts does not abolish the reservation or change its boundaries. *United States v. Pelican*, 232 U.S. 442 (1914). The extinguishment of Indian rights is not

to be implied but must be expressly declared by acts of Congress. *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941). The Indian petitioners contend that unless and until the Congress expressly enacts an act such as a Termination Act abolishing or constricting the boundaries of the original Puyallup Indian Reservation, the original boundaries of that reservation mark the area within which the communal fishing rights reserved to the tribe by federal Treaty may be exercised without State restriction.

II. A State Court Has No Power or Jurisdiction to Abrogate a Term of a Federal Treaty by Removing Rights, Privileges or Immunities Reserved Therein to an Indian Tribe

The supremacy clause provides in part that all treaties made under authority of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby. Article VI, United States Constitution. The Indian petitioners were reserved the right of taking fish at all usual and accustomed grounds and stations by Article 3 of the Treaty of Medicine Creek. This provision of the Treaty has been continually construed as reserving to the Indians their ancient right to net fish in accordance with their immemorial customs, which right is superior to that enjoyed by others. *Tulee v. Washington*, 315 U.S. 681 (1942).

The regulations of the respondent state departments upheld by the Court below provide in effect that petitioners cannot catch fish at their usual and accustomed grounds and stations except in the same manner as non-Indians. As the Puyallup Indians are guaranteed the same fishing rights as all others under Amendment 14 of the United States Constitution, the ruling of the Court below

has nullified and rendered meaningless Article 3 of the Treaty of Medicine Creek which reserved to the Puyallup Indians their right to net fish in the tribal manner in these areas.

III. The Court Below Was Without Jurisdiction to Decide This Case and Its Holding Is Invalid

Without the consent of the Indian Tribe or the consent of the United States government, the Tribe cannot be sued in a State Court. *Turner v. United States*, 248 U.S. 364 (1919); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957).

IV. The Injunctive Order Issued Pursuant to the Holding of the Court Below Is Invalid As It Denies to Petitioners the Equal Protection of the Laws Guaranteed to Them by Amendment XIV, Section 1 of the United States Constitution

The State of Washington makes no provision in its game and fisheries laws for enjoining violations by non-Indians. Thus every non-Indian is afforded basic legal and procedural safeguards, including the presumption of innocence whenever accused of violation of State game and fisheries laws or regulations promulgated pursuant thereto. The State tried previously to prosecute the Indian petitioners for alleged violations but was unsuccessful because the burden of proof was unbearable. By bringing an injunctive action, the respondent departments were able to shift this burden to the accused and thereby deprive them of their constitutional safeguards as accused persons. The only situations in which courts will allow the use of an injunction against criminal violations is to enjoin acts which might result in probable immediate and irreparable damage to public property. As petitioners

were only taking three to five percent (3% to 5%) of the total catch and had been doing so for over one hundred (100) years there is no showing of any such immediacy or damage in the record of the instant case. The Indian petitioners contend they are entitled to the same protective Constitutional safeguards as non-Indians.

ARGUMENT

I. The Restrictions Imposed by the Washington State Supreme Court Upon the Exercise of the Treaty Reserved Fishing Rights of the Puyallup Indian Tribe Are Invalid as They Are Beyond the Limitations of the State's Power to Regulate

Background of the Treaty Fishing Right.

The Indian petitioners are successors in interest to the signers of the Treaty of Medicine Creek of 1854, 10 Stat. 1132.

Under the terms of the Treaty, the Puyallup Indians gave up and extinguished their Indian title to vast real estate holdings to the federal government in exchange for a small land reservation and certain reserved tribal communal fishing rights which were not attached to the land but were exercisable within the reservation and that area in which "the usual and accustomed grounds and stations" were situated. The reservation was enlarged later by Executive orders of January 20, 1857, and September 6, 1873. Article III of that Treaty reserved to the Indians their vested fishing rights as follows:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the territory. . . ."

The meaning attached to these words must receive a

construction which is most favorable and liberal towards the Indian signators and are to be further construed in the sense that the Indians would understand them as the Indians were a dependent people and accepted the terms without discriminating scrutiny. *U.S. v. Shoshone Tribe of Indians of Wind River, Wyoming*, 304 U.S. 111 (1937); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Nielsen v. Johnson*, 279 U.S. 47 (1928).

Construing the terms in a favorable and liberal manner towards the Indians and in a sense that the Indians would have understood them, these constructions may be indulged in:

(1) The right of taking fish in accordance with tribal custom was absolutely secured;

(2) This right of taking fish was secured without restriction forever as nowhere in the Treaty is there any provision that the right was subject to being taken away upon the occurrence of future events;

(3) This vested right of taking fish was not only secured to fishing within the boundaries of the reservation surveyed and staked out, but also at all usual and accustomed grounds and stations outside the exterior original boundaries of the reservation.

The opinions of this Court have uniformly construed words identical to those appearing in Article III as meaning these words reserved to the Indians the right to fish in accordance with their immemorial tribal customs at their usual and accustomed places, which right was beyond those which other citizens may enjoy. The following quote from *Tulee v. Washington*, 315 U.S. 681 (1942), logically sets forth the meaning of this phrase:

> "In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1038, 25 S.Ct. 662, this court held that despite the phrase 'in common with citizens of the territory,' Article 3 conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded areas; and in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 63 L.Ed. 555, 39 S.Ct. 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognized the full obligation of this nation to protect the interest of a dependent people."

This right to fish unrestricted at usual and accustomed grounds and stations is a communal tribal property right vested in the tribe; it was a tribal property right not subject to individual alienation. *Mason v. Sams*, 5 F.2d 255 (1925); *Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl.) 1961. It is an ancient right reserved by the Indians out of those lands ceded to the United States, and was not a grant of anything to them. *United States v. Winans*, 198 U.S. 371 (1905). It was a right reserved under contemplation of sale of the ceded lands and imposed upon those lands a servitude as though described therein. *United States v. Winans, supra; Seufert Bros. Co. v. United States*, 249 U.S. 194 (1954).

The customary tribal fishing right being carried out by the Puyallup Indians at the time the Treaty of Medicine Creek was entered into in 1854 constituted the following:

(1) Manner of fishing: Dr. Herbert Taylor, the respondent departments' expert witness, testified that the Puyallups fished with weirs and traps (A. 182), spears (A. 182) and nets (A. 182); and normally fished at night (A. 182);

(2) Commerce: Dr. Taylor testified that the fish and clams were not only used for personal consumption but were also traded to obtain necessary commodities and constituted part of the trade with the Hudson's Bay Company (A. 184, 185);

(3) Geographical area: The fishing right was carried on, according to Dr. Taylor, not only within the boundaries staked out for the reservation, but also at "accustomed grounds and stations" within and without the reservation. This was understood by both parties when the Treaty was entered into (A. 183 184). This was a necessary and vital provision of the Treaty (A. 183). The geographical area of the "usual and accustomed grounds and stations" was marked by Dr. Taylor and introduced as defendants' Exhibit EE (R.D. Ex. EE). The area according to Dr. Taylor's testimony consisted of not only the Puyallup River drainage but also various areas of Puget Sound, including specifically Commencement Bay (A. 186). The Puyallups knew where their "usual and accustomed grounds" were located and protected them (A. 181).

That the reserved fishing right was a necessary, sub-

stantial and vital part of the Treaty of Medicine Creek was testified to by Dr. Taylor (A. 183). The Puyallups primarily depended upon the sea and the Puyallup River for their livelihood (A. 180, 181). Article 3 of the Treaty of Medicine Creek pointedly sets out the fishing right.

A. The Exercise of the Reserved Treaty Fishing Right at All Usual and Accustomed Grounds and Stations Outside the Exterior Boundaries of the Puyallup Indian Reservation Is Not Subject to Restriction in Any Manner Where There Is No Proof That Such Restriction Is Indispensable for the Conservation of the Fishery.

Of the total catch of fish from the Puyallup River, anadromous fish runs, the catch by the Indian petitioners as the result of self-imposed restraint amounts to only about three to five percent (3% to 5%) of the total catch. All the rest of the catch from these runs, .i.e. about ninety-five to ninety seven percent (95% to 97%), is made by the respondent "regulated" non-Indian commercial and sports fishery.

These percentage figures indicating the small portion of the total catch being taken by the Indian petitioners prior to the issuance of the permanent and total injunction against them, is fully supported by the evidence, was so found by the trial court which studied the testimony of witnesses given on direct and cross-examination, charts, diagrams, etc. in nearly three (3) weeks of trial, are admitted to by respondent departments, and at no time have they been controverted by the trial court or the court below in their findings and opinions.

On page 22 of the trial court's Memorandum of Opinion, which the Court below accepted as "a very able and

scholarly document" (A. 28), the trial court found from all the evidence presented that:

> "The evidence indicates, however, that the Indian catch of salmon and steelhead is only about three to five percent (3% to 5%) of the total."

Respondents' own statistics (Plaintiff's Ex. No. 32) (R. P. Ex. 32) places the Indian catch at these figures. This was substantiated by the testimony of Clifford J. Millenbach, assistant chief of fish management division (A. 180). It was admitted by Dr. Donaldson, a State witness, that in 1956 the sportsmen caught 18,500 steelhead to the Indian's 1,500 steelhead, and it is to be noted that the sportsmen fish up river from the Indian net fishery (A. 164).

As the Indian petitioners have no funds or resources to make a survey and statistical analysis of the percentage of Puyallup River fish taken by the Indians as opposed to the non-Indian commercial and sports fishery, the petitioners have no alternative except to accept respondent departments' evidence and statistics that the Indians catch only about three to five percent (3% to 5%) of the total catch as being approximately correct.

Although it would appear that the Indian petitioners should be commended for their self-restraint in taking so few fish in the exercise of their reserved Treaty fishing rights, the trial court and the Court below both held that the taking of this small percentage or any percentage of the run by the Indians would result in "nearly complete destruction" of the fish runs in the Puyallup River.

The reason why these able judges could arrive at such strange and (at least to petitioners) inequitable holdings

is rather simple and is best illustrated as follows. The regulations of respondent departments in effect divide the Puyallup River anadromous fish runs into two distinct numerical groups. The ninety-nine percent (99%) group and the one percent (1%) group. The ninety-nine percent (99%) group is the group that may be caught by commercial nets, sportsmen or otherwise killed without endangering the fish runs through having too few fish returning to spawn. The one percent (1%) group is the "brood stock" group or "non-nettable" group and is the number which must be allowed to escape to spawn if the fish runs are to be continued. The respondent departments regulate the non-Indian commercial fishery so that all the netting of fish from this ninety-nine percent (99%) "nettable" group occurs outside the usual and accustomed grounds and stations of petitioners, i.e. Commencement Bay and the Puyallup River where the Indian fishery is located. The only fish from the ninety-nine percent (99%) fish group which are allowed to live to enter this area are the quota figured to be taken by sports fishermen. As the only fish left after the commercial netting and sports fishing are taken care of is the one percent (1%) non-nettable "brood stock" group, the fish allowed to be caught by petitioners without endangering conservation of the fish runs are non-existent.

Thus the somewhat strange holding that the Indian catch of only about three percent to five percent (3% to 5%) of the total catch of the Puyallup fish could result in "nearly complete destruction" of the fish runs. To arrive at its holding under this factual pattern, the Court below constructed a test to be followed in determining whether or not the Indian petitioners can be validly re-

strained and enjoined from exercising their Treaty fishing right to net for fish in the Puyallup River and Commencement Bay. This test appears to be that if the statutes or regulations of the State prohibiting the exercise of such rights are "reasonable and necessary for the preservation of the fishery" then the Indian petitioners can be restrained and enjoined. Coupled with this test is the statement of the court that "the state has clearly met that test, at least to the extent that it has established that continued use by the defendants of their drift nets and set nets would result in the nearly complete destruction of the anadromous fish runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery."

Indian petitioners submit that this "test" is no test at all. There is simply nothing left to test. The phrase "reasonable and necessary" when applied to test whether or not non-existent fish, i.e. fish other than brood stock and the quota figured to be taken by river sports fishermen, can be taken has no meaning. If the respondent departments regulated the non-Indian commercial netting of these fish or reduced the quota reserved for non-Indian river sports fishermen so that any percentage of the "nettable" fish from the Puyallup River fish runs remained to be netted, then this test might have some utility. Absent any "nettable" fish it has none.

Precedence for the use of the words "reasonable and necessary" in establishing its test as to whether or not the Indian Treaty right could be abolished was found by the Court below in the use of one or the other of these words in *Tulee v. Washington*, 315 U.S. 681 (1942); *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226

(9th Cir. 1951); and *U.S. v. Winans*, 198 U.S. 371 (1905).

Petitioners submit that when these words are read in context with the holdings of the cited cases they lend no support whatsoever to the holding of the court below. At most these cases impart the reasoning that the fish runs are to be shared between those having special Treaty rights and those not having such rights. The words "reasonable and necessary" when used by the Court below mean that by administrative manipulation of the location where fish can be netted, non-Indians can be allowed to take not just ninety-five percent to ninety-seven percent (95% to 97%) of the catch but all of the total catch and Indians having Treaty fishing rights to net fish can be totally and permanently prohibited from taking any fish if the regulations so prohibiting are deemed by a State to be "reasonable and necessary to the conservation of the fishery."

In its opinion, the Court below gave consideration to the so-called "indispensable" test laid down in *Maison v. Confederated Tribes of Umatilla Reservation*, 314 F.2d 169 (C.A. 9th, 1963), but rejected this test as "creating a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming Treaty rights" (A. 52).

The meaning given to "indispensable" by the federal court in the *Umatilla* case is quite clear. In the *Umatilla* case as in the instant situation the fisheries conservation experts testified that their conservation regulations were designed to provide fish for commercial and sports fisher-

men, without any regard for the Indian fishery. (See testimony of J. E. Lasater, Assistant Director of the State Department of Fisheries (A. 177) where it is admitted that the Indian fishery is disregarded because from a conservation standpoint the allowable ninety-nine percent (99%) mortality must or should occur prior to the entry of fish into the Indian fishery). We quote from page 173 of the *Umatilla* case.

> "In Dr. Rayner's view, 'conservation' is a term which involves a compromise of the competing interest of the many groups of society that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that by 'conservation,' the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word 'conservation' in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, 'I believe that the regulations are necessary to conserve fish for commercial and sports fishermen, disregarding the needs of the Indians altogether.'
>
> "(2) Such a statement is not evidence of that 'necessity for conservation' required by the *Tulee* case. *In that case the Supreme Court held that a regulation to be necessary, must be indispensable to the effectiveness of a State conservation program. It follows that restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others.* Dr. Rayner, in testifying that a limitation of plaintiffs' fishing was necessary, not only ignored that requirement, but based his opinion on the contrary premise that the taking of fish by Indians can validly be restricted to satisfy the needs of the rest of society." (Emphasis supplied)

On Page 174 the Court listed one of the alternative con-

servation measures which must be resorted to before restriction of the Indian fishery becomes "indispensable," we quote:

> "But the defendants argue that none of the alternative conservation measures specifically enumerated in the trial court's findings were available. For example, one of those listed was that the defendants could achieve conservation by limiting or prohibiting the taking of fish by sportsmen on the spawning grounds, and defendants argue that to do this would violate the provisions of the Treaty.
>
> "(5, 6) However, the Treaty dealt only with the rights of the plaintiff's ancestors, and did not secure rights to any other groups or class. Therefore, while a restriction of the fishing activities of plaintiffs must be *indispensable*, as required by the Treaty (*Tulee v. Washington, supra*) a restriction of the fishing activities of other citizens of a state is valid if merely reasonable, as required by the Fourteenth Amendment to the United States Constitution. *Thomason v. Dana*, 52 F.2d 759 (D. Ore. 1931), aff'd 285 U.S. 529, 52 S.Ct. 409, L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the State possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others."

See also the reasoning of *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (1951), that there must be a showing that other alternatives must be first exhausted before the Indian Treaty fishing rights can be restricted, one of which alternatives is evidence that the State has sought cooperative agreements with the Indians as "one of the forms of giving the Indians their treaty rights." The State has made no such attempt in the instant case (A. 177).

The crux of the *Umatilla* case "indispensable" test is that it takes into consideration the non-Indian fishery as well as the Indian Treaty fishery and provides for a sharing of the fishery. The "reasonable and necessary" test of the court below takes into consideration only the Indian fishery, does not as much as even mention the non-Indian fishery which takes so many fish, that only "brood stock" is left for the Indians, and thus provides for no sharing of the fish whatsoever.

To sustain its position that the *Umatilla* case "indispensable" test is "completely unworkable" the Court below insinuates in its opinion that the Indian petitioners were not sharing the returning fish with non-Indian commerical and sports fishermen and were carrying on an irresponsible fishery that is harmful to conservation of the fishery. See page (A. 54) of the opinion of the Court below and footnote on page (A. 49) of the opinion where the Court below states: "5. For a better understanding of the necessity of conservation regulations to conserve the salmon runs, see the opinon in the *McCoy* case *supra* (citation: 63 Wn.2d 421, 387 P.2d 942 (1963)) and Judge Finley's concurring opinion in *State v. Satiacum*, 50 Wn.2d 535, *et seq.* 314 P.2d 400 *et seq.* (1957)." Note that nowhere in the opinion of the Court below is the finding of the trial court and admission of respondents that the Indians were taking only three percent to five percent (3% to 5%) of the total catch, even as much as mentioned. Nowhere in that opinion is any mention made that the remaining ninety-five percent to ninety-seven percent (95% to 97%) of the total catch was being made by non-Indian fishing. The apparent reason for this is that the "reasonable and neces-

sary" test of the court below does not provide for a sharing of the fish so no statement of comparative percentages was necessary.

The Indian petitioners submit that experts and statisticians in fish management are not available to them and the record replete with exhibits and page after page of testimony of respondents departments' witnesses should be viewed in the same light that evidence of interested witnesses is so viewed. The worth of this testimony and evidence and the close scrutiny it should be subjected to is best indicated by the comparative statistics proffered to the court below by these same respondents in *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963) the case mentioned in the footnote to page (A. 49) of the opinion of the court below as evidencing proof of how adversely the Puyallup Indian fishery affects conservation and the necessity for regulation. On page 427 of the *McCoy* opinion the respondents' proffered evidence as to the Puyallup River was adopted as follows:

> "Exhibit No. 14 illustrates graphically what occurs when unrestricted fishing is permitted. It shows the catch record of only a few fish in 1953 and more than 14,000 fish in 1960. While the escapement records show approximately 13,000 fish in 1953 and less than 1,800 fish in 1960."

The court below was not informed in this proffered evidence that what was being compared was the record of escapement in a normally heavy run in 1953 as against one of the poorest runs in history not only in the Puyallup River but all rivers in the State of Washington in 1960. This is indicated by the testimony of respondents' own expert J. E. Lasater, Assistant Director of the State of

Washington Department of Fisheries, given on cross-examination (A. 173-174) as follows:

"Q. Now, this would raise the possibility, would it not, sir, that there was a factor outside the Puyallup watershed itself which contributed to, or caused that decline?

"A. We are confusing brood years here. 1960 *was the very bad year.* 1963 *was the result of a progeny from a very poor over all decline in* 1960. The run is up considerably by brood year 1963 over the parent stock. You see, you are comparing one parent stock with another.

"Q. Well, would the new year, 1960, and the fact that this was an across-board low year, would that raise in your mind the possibility of the existence of a factor outside the Puyallup River watershed itself?

"A. Yes, it does. We had to put in the emergency closure that year to get a sufficient spawning stock on the grounds.

"Q. Well, and the run was very poor that year, wasn't it?

"A. Yes, the run was poor in 1960." (Emphasis supplied)

The petitioners further submit that the majority of the evidence introduced by exhibits and testimony of respondents' own witnesses is susceptible to the same misleading conclusion as the comparison of the year 1953 with 1960 in the *McCoy* case.

Throughout the trial, the Indian petitioners tried again and again to elicit from respondent departments' witnesses whether or not the Puyallup Indian fishery was responsible for more or less than only three to five percent (3% to 5%) of the total harvest of the fish runs as

compared to other fishery groups. These inquiries were met only by evasion. See for example, testimony of J. E. Lasater, Assistant Director of the Department of Fisheries (A. 174-175). On (A. 175) this witness testified the percentage of harvest by commercial and sportsmen as opposed to the Puyallup Indian fishery could be ascertained, but the reason it has not been is that from the respondents' standpoint, conservation regulations as to the Puyallup River fish runs are designed so that a ninety-nine percent (99%) mortality occurs or should occur *prior* to the entry of the fish runs into the Puyallup Indian fishery (A. 176-177). On (A. 176-177):

"Q. Would it be accurate to say that in your regulations, you have not found it necessary to work with any comparison of the proportion of the run which is taken by the Puget Sound commercial fishermen as opposed to Indian net fishery on the Puyallup River?

"A. For that particular river, no.

"Q. And, sir, would I be accurate in saying that this is because you have determined from a conservation standpoint that the ninety-nine percent (99%) mortality must or should occur prior to entry into the Indian fishery?

"A. Yes."

From this witness's testimony, it appears from the respondent departments' standpoint that the Puyallup Indian fishery must be absolutely prohibited to allow the necessary one percent (1%) escapement as the State regulations provide that ninety-nine percent (99%) of the mortality must or should occur prior to their taking any fish (A. 177). In other words, the Treaty fishing rights of the Puyallup Indians are not to be taken in account as to the harvest of any of these fish. The respondent depart-

ments, however, admit (A. 175-176) that the fishery of non-Indians is taken into account in determining the harvest within the allowable ninety-nine percent (99%) mortality, and that if the sports fishery is two percent (2%) then in order to preserve the runs, then two percent (2%) must be taken from the commercial fishery or other mortality factor (A. 175-176).

If the Puyallup Indian fishery of three percent to five percent (3% to 5%) (the respondents' figures) was completely prohibited, then the commercial and sports fishery would still be designed so that a ninety-nine percent (99%) mortality would occur as this is in accordance with state conservation practices (A. 177).

To substantiate its figures that the Puyallup Indian fishery takes three percent to five percent (3% to 5%) of the total runs and as this is not taken into account in the conservation program of the State the escapement to the spawning ground is inadequate, the respondents introduced numerous diagrams, photographs and testimony of their own interested employees. The worth of these diagrams is evidenced by the testimony of Officer Wayland who admitted the nets drawn on his diagrams represented *all* the nets that were ever seen by him over a period of three to four years and did not represent the nets used at any one time, that they were not drawn to scale (A. 167), are used only on out-going tides (drift nets) (A. 165), that tug boats, logs, and debris take them out and prevent netting of fish (A. 166). The trial court commented that the use of words "sweeping the river clean of fish" by this witness were not supported by the evidence (R.S. 670). George Smallwood,

State game protector, testified the nets never went more than half-way across the river (A. 169) and that the diagrams introduced by respondent departments were distorted. On the bottom (A. 169). "No, sir. According to, looking to the map there, I am trying to be honest as absolutely possible. I never saw a net that would cover half-way across the river, about, or quite half way across the river." Appellants submit that this voluminous evidentiary material introduced by respondents does not alter or controvert the admitted statistics of the state and the finding of the trial court, that the Puyallup Indian fishery does not harvest over three percent to five percent (3% to 5%) of the total fish catch.

As the commercial and sports non-Indian fishery percentage figures as to their harvest of these runs is peculiarly within the knowledge of the respondent departments this percentage can only be deducted from the testimony and evidence submitted by respondents' own witnesses. The Indian petitioners submit that it is beyond their limited funds and resources to hire a man to observe the non-Indian fishery for three to four years as did respondents in so employing Officer Wayland (A. 167), or to have aerial and other expensive photographs taken or diagrams drawn in the most favorable light possible to influence the court's judgment away from the cold statistics.

The Indian petitioners do submit that respondents' own witnesses have painted word pictures of the enormity of the commercial and sports non-Indian fishery percentage of this allowable ninety-nine percent (99%) mortality as against the three percent to five percent (3% to 5%) of the total catch taken by the Indian fishery. Mr. J. E.

Lasater, Assistant Director of the State Department of Fisheries, testified that the Puyallup River runs are first identifiable in the Straits of Juan de Fuca (A. 172-173) and the commercial fishery consisting of hundreds of boats begins its harvest from Discovery Bay continuously area after area down through "poor and better grounds" the length of Puget Sound to the mouth of Commencement Bay (A. 172).

The effectiveness of the commercial fishing boats attacking this run over and over again is best illustrated by the testimony of Edward Sardanov, Fisheries Patrol Officer, who states that nets are used up to 1,800 feet in length (one-third of a mile) and take up to 2,500 to 3,000 fish in one "set" (A. 167-168). These "sets" are made by 1,800-foot nets all the way to the mouth of Commencement Bay at Brown's Point (A. 168). (R.D. Ex. F).

When these "sets" are multiplied by two or three a day (A. 167-168) by hundreds of boats, the vast actual percentage of the ninety-nine (99%) percent mortality contributed by the commercial fleets is readily apparent. The commercial fishery uses every imaginable type of net and fishing device not even conceivable when the Treaty of Medicine Creek was entered into.

Respondent departments' licensing statutes (R.C.W. 75.28.120, 75.28.240) describe them as set lines, troll lines, gill nets, set nets, dip bag, drag seine, lampara nets, purse seines, otter trawl, reef nets, fyke nets, brush weirs and ring nets. The Indian petitioners submit that the restriction of these efficient devices for only one day would save more fish than the Indians take all season.

To summarize: The exercise of the fishing rights re-

served to the Indian petitioners at usual and accustomed grounds and stations accounts for only three to five percent (3% to 5%) of the total catch of the fish runs in the Puyallup River. An escapement of one percent (1%) to the spawning grounds is necessary to maintain those runs. The respondent departments' regulations are designed for a mortality of ninety-nine percent (99%) of the runs to provide a maximum catch for commercial and sports fishermen, without any provision for consideration of the Indian fishery catch within that ninety-nine (99%) figure. The State cannot restrict the Indian Treaty fishery without showing such restriction is "indispensable" to its conservation regulations. To be "indispensable" other available alternatives must first be resorted to, such as restriction or limitation of the sports and commercial fishery. Such alternatives have not been resorted to and thus the holding of the court below is invalid.

B. The Exercise of the Reserved Treaty Fishing Right Within the Exterior Boundaries of the Original Puyallup Indian Reservation Is Not Subject to Restriction by State Regulations; the Puyallup Indian Reservation Exists and a State Court Has No Jurisdiction to Abolish It.

For the convenience of the court and to avoid repetition, the problem of the "on reservation" Treaty fishing right and the existence of the Puyallup Indian Reservation are discussed under this single heading.

The courts are uniform in stating that enrolled members of an Indian Tribe to whom fishing rights have been reserved by federal Treaty may exercise those rights within their reservation boundaries without restriction by the State laws or regulations. *United States v. Winans*, 198

U.S. 371 (1905); *Moore v. United States*, 157 Fed.2d 760 (9th Cir.) (1946); *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 Pac. 557 (1930); Cohen, *Handbook of Federal Indian Law*, pages 285, 286.

The court below held however that the Puyallup Indian Reservation has ceased to exist and that the Puyallup Indians no longer have any special or treaty rights to fish thereon because it was once a reservation (A. 54). The reasoning of the court below appears to be that as the major share of the reservation passed into fee simple private ownership pursuant to the federal allotment act even though much of it is still remains in the possession of the original Puyallup Indian allotees, this has caused the reservation to be terminated and the petitioning Puyallup Indians to lose the communal tribal fishing rights reserved to them by the Treaty (A. 47).

The fallacy in this reasoning, petitioners contend, is that the communal tribal fishing rights reserved to the Puyallup Indian Tribe by the Treaty with the United States government has nothing to do with the reservation *land* itself. The original boundary to the reservation land sets the area within which these tribal rights may be exercised without state restriction. These treaty reserved fishing rights are separate from the land and may be exercised at any time without state restriction unless prohibited or changed by the federal government.

The Indian Petitioners find no quarrel with those cases which have held that Indians committing crimes on allotted lands within the original boundaries of an Indian reservation are subject to state prosecution where federal supervision and jurisdiction is lacking and there exist no

tribal policemen or courts. Such cases involve no Treaty reserved property rights or activities exercisable under an existing federal supervision as in the instant case. The Treaty of Medicine Creek contains no provision reserving to any Puyallup Indian a right to commit murder, robbery or any other felony or crime and to go unpunished. Those cases involve no Treaty right and are distinguishable on that ground. Note, however, that a State has no jurisdiction over tribal Treaty rights even as to crimes committed by Indians on alienated lands within original reservation boundaries where provision has been made in the Treaty or federal statutes for tribal courts and tribal enforcement officers and the federal government exercises an existing jurisdiction and supervision over such matters. See *Seymour v. Warden of Washington State Penitentiary*, 368 U.S. 351 (1961).

The Indian petitioners contend that once the original boundaries of the Puyallup Indian Reservation were surveyed and staked out pursuant to Article II of the Treaty of Medicine Creek and as changed by the Executive orders of January 20, 1857 and September 6, 1873 as recognized as valid and conclusive boundaries in *Ross v. Eells*, 56 Fed. 855 (1893), those surveyed and staked out boundaries set the limits within which certain property rights and activities provided for in the Treaty (including the on-reservation fishing rights) could thereafter be exercised under exclusive federal supervision, and the patent, allotment or alienation of lands pursuant to the federal allotment acts had no effect upon those boundaries as to those rights and activities which do not depend upon actual tribal ownership of land.

This contention finds support in the Treaty of Medicine Creek, in actions by the Congress and in Federal case law.

(1) *Treaty support.*

Article 6 of the Treaty of Medicine Creek provided for the allotment of lands within the reservation to individual members of the Puyallup Tribe. Nowhere in that Treaty is there expressed any intention that acceptance of allotments would be at the expense of loss of the right of exercise of specifically reserved and vital fishing activities within the confines of the original reservation boundaries. Reading such a provision into the Treaty would be directly contrary to the rule of construction that Indian Treaties are to be interpreted in a liberal sense in favor of the Indians. *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 115 (1942); *Nielsen v. Johnson*, 279 U.S. 47, 73 L.Ed. 607 (1928).

(2) *Congressional support.*

The Congress provided in the Enabling Act whereby the territory of Washington was allowed to become a state that "Indian lands shall remain under the absolute jurisdiction and control of the United States". . . when statehood was assumed. 25 Stat. 676.

The term "Indian lands" used in the Washington Enabling Act appears to be analogous to the term "Indian country." The Congress in 62 Stat. 683, 757, 18 U.S.C. 1151 defines "Indian Country" in part as follows:

> "Except as otherwise provided in sections 1154 and 1156 (liquor offenses) of this title, the term 'Indian Country,' as used in this chapter, means (a) all land within the limits of any Indian Reservation under the jurisdiction of the United States government, *notwithstanding the issuance of any patent, and, includ-*

ing rights-of-way running through the reservation. . . . ." (Emphasis supplied)

Thus it would appear that the State of Washington by agreement in the Enabling Act for that state, disclaimed all jurisdiction and control over Indian lands within the territory of Washington and is therefore precluded from assuming any jurisdiction or control over the exercise of Treaty reserved fishing rights within the confines of the original Puyallup reservation boundaries, which the Congress has concluded in its definition of "Indian Country" as being unaffected by the issuance of fee patents.

Nowhere in the enactment of Congress of the Puyallup Allotment Act of 1893 (27 Stat. 633) or the Cushman Act of 1904 (33 Stat. 565) is there any expression that the acceptance of allotments would be at the expense of loss of the right to exercise Treaty reserved property rights and activities within the confines of the original reservation boundaries. Statutes terminating Indian rights are to be narrowly construed. *United States ex rel. Shoshone Indian Tribe v. Seaton,* 248 F.2d 154 (1957).

The Congress has expressly recognized the existence of the Puyallup Reservation and that the boundaries have not been constricted by the issuance of fee patents. See Report with respect to the House Resolution of the Committee on Interior and Insular Affairs to conduct an investigation of the Bureau of Indian Affairs, House Report No. 2503 82nd Cong., 2nd Sess. (Govt. Printing Office, 1953) which states on page 933 in referrring to the Puyallup Reservation, Washington as follows:

> "The original area was 18,061 acres. In 1950 the area consisted of 33 acres of tribal land and 17,867 acres patented in fee."

Whenever the Congress has deemed it necessary to constrict the boundaries of an Indian reservation or abolish the reservation it has uniformly done so by enactment of Termination Acts (See 25 U.S.C., Chapter 14). Allotment acts are not used for this purpose for the reason that they are enacted for an entirely different purpose. In the Termination Acts specific and detailed provisions are made for division of tribal property, rights and assets, termination of federal programs, determination of rights of descent and distribution, and the protection of minors and disabled persons through appointment of guardians or representatives for them.

(3) *Federal case support.*

The United States Supreme Court has continuously held that only the Congress has the power to abolish or constrict the boundaries of an Indian reservation. *United States v. Celestine,* 215 U.S. 278 (1909); *Board of Commissioners v. Seber,* 318 U.S. 705 (1943); *Seymour v. Superintendent,* 368 U.S. 351, 359 (1962). The underlying reasoning of the courts in placing the question of termination of an Indian reservation or change in reservation boundaries with the Congress and executive branch of the federal government is not only because the whole subject of dealing with the affairs of Indians was committed to the federal government by Article I, Section 8, Clause 3 and Article II, Section 2, Clause 2 of the United States Constitution (See *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831) 5 Pet. 1, *Worcester v. Georgia,* 6 Pet. 515 (1832); holding reaffirmed in *Colliflower v. Garland,* 342 F.2d 369 (1965), but also is based upon the need for *uniformity of recognition* by state governments as well as the

branches and agencies of the federal government to avoid conflicts and inconsistencies and to promote an orderly transfer of jurisdiction over reservation lands and tribal property rights exercisable within the original boundaries of such reservations.

The United States Supreme Court has held that the allotment of land in severalty within the original boundaries of a reservation does not change the reservation. *United States v. Pelican,* 232 U.S. 442 (1914); *United States v. Celestine,* 215 U.S. 278 (1909); *United States v. Sutton,* 215 U.S. 291 (1909). See also *Guith v. United States,* 230 F.2d 481 (9th Cir. 1956); *Moore v. United States,* 157 F.2d 760 (9th Cir. 1946).

The court below on page 249 of its reported opinion (A. 47) cites *United States ex rel. Marks v. Brooks,* 32 F.Supp. 422 (N.D. Ind. 1940), as authority that a federal allotment act does away with the Indian reservation or constricts its boundaries in such a way as to eliminate the reserved tribal communal fishing rights. This cited district court case involved several treaties, none of which employed language such as that used in the Treaty of Medicine Creek which expressly and pointedly reserved to the Indians their fishing rights. Also the judge in the *Marks* case pointed out on page 427 that the Department of the Interior had made the necessary federal level political decision disclaiming any further responsibility for the tribe. Petitioners fail to understand the citation of *Pennock v. Commissioners,* 103 U.S. 44 (1881) and *Spalding v. Chandler,* 160 U.S. 394 (1896), by the court below as additional support for this same proposition. The *Pennock* case appears to stand only for a proposition that

restrictions on alienation are removed when the patent of the federal government is issued for Indian-owned land. The *Spalding* case appears to support the position of petitioners that only the federal government has the power to terminate a reservation or constrict its boundaries, as this case holds that the termination of the existence of an Indian reservation, the constriction of its boundaries, or the extinguishment of Indian Treaty rights in connection therewith can only be done by an *express* declaration of the Congress and such declaration cannot be *implied* from an act of Congress setting aside a portion of the Indian reservation as public use land. This case is analogous as to its facts with the instant situation where the court below, the Washington State Supreme Court, held that an Indian reservation can be terminated by implication from a federal act enacted for a different purpose. The *Spalding* case is footnoted in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941) at page 357. The *Santa Fe* case holds that the power of Congress as to extinguishment of Indian title is supreme and exclusive with the Congress. The exercise of this power cannot be implied but must be expressly declared by Congress. On page 354 the court stated:

> "But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, 56 L.Ed. 941, 946, 32 S.Ct. 565, the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.'"

The Indian petitioners submit that unless and until the Congress enacts a Termination Act terminating federal supervision over the Puyallup Indian reservation or constricting the boundaries of the original Puyallup Indian reservation, the original boundaries mark the area within which the fishing rights reserved to them by the Treaty of Medicine Creek may be exercised without restriction by state laws or regulations.

II. A State Court Has No Jurisdiction to Determine the Extent of the Rights, Privileges or Immunities of an Indian Tribe's Treaty With Respect to Fishing and Further to Affirmatively Limit Such Rights, Privileges or Immunities to the Same Extent That All Other Citizens Not Having Treaty Rights Are Limited.

The Supremacy Clause provides as it did at the time the Treaty of Medicine Creek was entered into in 1854:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; *and the judges in every state shall be bound thereby,* anything in the constitution or laws of any state to the contrary notwithstanding." (Emphasis supplied). Article VI, United States Constitution.

Under Article II of the federal Constitution the chief executive was granted the power to make treaties, by and with the advice and consent of the United States Senate. Under Article I of the federal Constitution, the Congress was granted the exclusive power to regulate commerce with the Indians.

Pursuant to such powers the Treaty of Medicine Creek was entered into.

Article III of the Treaty of Medicine Creek reserved to the Puyallup Indians:

> "The right of taking fish at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens. . . ."

The holding of the Court below and the injunctive order issued pursuant thereto if allowed to stand will permit the State of Washington to completely erase these words from the Treaty. Prior to Treaty time, and for over a century thereafter the Indian petitioners have netted for fish in the Puyallup River and Commencement Bay (A. 182). These areas are part of their "usual and accustomed grounds and stations" (A. 186).

The Indian petitioners submit that the "reasonable and necessary to the conservation of the fishery" test set forth in the opinion of the Court below (A. 54) when applied to "non-nettable" brood-stock fish which are the only fish allowed by respondent departments to enter petitioners' "usual and accustomed grounds and stations" other than the quota figured to be taken by sports fishermen, simply means that the court below has construed this term of the Treaty to mean the petitioners cannot catch fish at their "usual and accustomed grounds and stations" except in the same manner and at the same times as other inhabitants of the state may exercise whatever rights they may have in this regard.

As the Puyallup Indians are guaranteed the same fishing rights under Amendment 14 of the United States Constitution as all others, regardless of their Treaty rights, this construction of the Treaty would render these words meaningless. *Makah Indian Tribe v. Schoettler*, 192 F.2d

224, 226 (9th Cir. 1951). The construction of these words which the court below would require is in direct contradiction to all rules of construction requiring an interpretation of Treaties liberally in favor of the Indian participants thereto. *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washingon*, 315 U.S. 681 (1942); *U.S. v. Shoshone Tribe of Indians of Wind River Wyoming*, 304 U.S. 111 (1937).

The federal courts including the United States Supreme Court have consistently and repeatedly held that the fishing rights reserved to Indians by treaty bestow upon them rights to fish outside the exterior boundaries of their reservations not enjoyed by non-Indian inhabitants. In *United States v. Winans*, 198 U.S. 371, 381, 382 (1905), the lower court decision was to the same effect as that of the lower court in the instant case. The Supreme Court reversed, stating:

> "In other words, it was denied (by the court below) that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and gave the word of the nation for more. . . .
>
> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a

reservation of those not granted . . . The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. . . . The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees."

In *Tulee v. Washington*, 315 U.S. 681 (1942), the United States Supreme Court again reaffirmed that Treaty fishing rights of Indians reserved to them greater rights than that enjoyed by non-Indian inhabitants as follows:

"In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1038, 25 S.Ct. 662, this court held that despite the phrase 'in common with citizens of the territory,' Article 3 conferred upon the Yakimas *continuing rights, beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places' in the ceded areas; and in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 63 L.Ed. 555, 39 S.Ct. 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the

> tribal representatives at the council and in a spirit which generously recognized the full obligation of this nation to protect the interest of a dependent people." (Emphasis supplied)

The Congress has determined that the manner, times and area of exercise of Indian Treaty fishing rights at usual and accustomed grounds and stations are rights not enjoyed by other inhabitants as indicated by the appropriations of large sums of money to extingish those rights. Indians having Treaty fishing rights on ceded lands at Celilo Falls were paid over Twenty-five Million Dollars for those rights when the Dalles Dam was constructed on the Columbia. Non-Indian fishermen have no rights that are subject to compensation. See *United States v. Brookfield Fisheries, Inc.*, 24 F.Supp. 712 (1938), as to Treaty fishing rights at usual and accustomed grounds and stations at Celilo Falls:

> "These treaties extended to them the right to fish where they had always fished. An easement was laid down of ingress to and egress from such usual and accustomed places. A fishery in gross was attached to all real property and titles subject to that description. The government was at that time, moreover, the sovereign and proprietor, and grants made then attached to all future conveyances as if written therein."

The power exercised by the state to regulate fishing is a police power derived from that residuum of sovereignty not delegated to the federal government. *Manchester v. Commonwealth of Massachusetts*, 139 U.S. 240 (1891). It follows that the power left to the states when the federal government was granted its delegated powers, is subject to the granted powers of the federal government and the exercise of them.

The sources of the Federal Constitution granted power are derived from the treaty making power of the President, the Supremacy of those treaties when entered into, and the exclusive power of the Congress to regulate commerce with the Indians.

A treaty entered into with an Indian tribe is supreme over the police power of even one of the original states. *Worcester v. Georgia*, 6 Pet. 515 (1832); *United States v. Salamanaca*, 27 F.Supp. 541 (1939). The fact of admission into statehood after a treaty has been made does not effect the supremacy of the treaty. *United States v. Winans*, 198 U. S. 371 (1905).

A treaty between the United States and Indian tribes is the supreme law of the land, and can not be reformed by the courts or treated by them as inoperative; and the power to make, modify, or abrogate is political and with Congress, which can not assign to the courts duties not properly judicial. *Osage Tribe of Indians v. U.S.*, 66 Ct. Cl. 64, certiorari denied 279 U.S. 811 (1928).

It is submitted that the police powers to regulate fishing reserved to the State of Washington are inferior to the federal treaty and the court below was bound to so recognize the supremacy of said treaty and its judgment and the resulting injunctive order abrogating one of the terms of said treaty are invalid.

III. A State Court Does Not Have Jurisdiction to Entertain an Action Against an Indian Tribe Without the Consent of the Tribe or the United States Government.

Without the consent or authorization from Congress, an Indian Tribe cannot be sued in any court. *Turner v.*

United States, 248 U.S. 364 (1919); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957). *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895).

Even a voluntary appearance by an Indian Tribe does not constitute the requisite consent to be sued. In *United States v. United States Fidelity and Guaranty Company*, 309 U.S. 506 (1940), an Indian Tribe suffered judgment on a counter-claim. Even though there was no objection raised as to jurisdiction, the judgment was held void when later attacked on this ground.

This immunity from suit is not destroyed by the acceptance of allotments, acquisition of citizenship, or loss of tribal lands. *United States v. United States Fidelity Guaranty Company*, 309 U.S. 506, (1940); *Haile v. Saunooke*, 246 F.2d 293, (4th Cir. 1957).

Various state courts including the State of Washington have recognized this tribal immunity. *State ex rel. Adams*, 57 Wn.2d 181, 356 P.2d 985 (1960); *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961); *State v. Bertrand*, 61 Wn.2d 333, 378 P.2d 427 (1963).

This tribal immunity from suit is applicable to suits in equity as well. *Iron Crow v. Ogallala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

The reserved treaty rights, which the court below has, without jurisdiction, ordered to be taken from the defendant Indian Tribe, is not an individual right but a Tribal communal fishing right. The tribal immunity from being sued cannot be evaded by bringing suit against tribal officers or members in respect to Tribal rights or

property. *Thebo v. Choctaw Tribe of Indians*, 66 Fed. 372 (8th Circ. 1895); *Barnes v. United States*, 205 Fed. Supp. 97 (D. Mont. 1962); *Adams v. Murphy*, 165 Fed. 304 (1908). This tribal immunity extends to an action to force compliance with a state statute. *Employment Security Department v. Cheyenne River Sioux Tribe*, 80 S.D. 79, 119 N.W.2d 285 (1963).

The petitioning Puyallup Tribe of the Puyallup Reservation has never been incorporated, did not incorporate under the second branch of the Wheeler-Howard Act (25 U.S.C. 477), and did not adopt a charter thereunder consenting to be sued in any court of competent jurisdiction. The mis-naming of this tribe as a corporation in respondents' complaint does not make it a corporation. By naming the tribal petitioner as "The Puyallup Tribe, Inc." over timely objection of appellants, respondents were apparently attempting to acquire jurisdiction under the reasoning of *Martinez v. Southern Ute Tribe*, Colo. (1962), 374 P.2d 691. The distinguishing difference is that in the *Martinez* case the tribe incorporated and adopted a charter giving its consent to be sued in any court of competent jurisdiction.

It is therefore respectfully submitted that the judgment of the court below and the injunctive order issued pursuant thereto are invalid as the Court lacked jurisdiction to entertain a suit against the Puyallup Tribe and its members to extinguish a Tribal communal fishing right guaranteed by federal Treaty when neither the Tribe, its members, nor the Congress had consented or authorized such a suit. Even though appellants objected several times before and during the trial that the court had no jurisdic-

tion, their failure to do so would not have conferred jurisdiction.

IV. The Holding of the Court Below and the Injunctive Order Permanently Enjoining the Indian Petitioners From Violating State Fisheries Laws and Regulations is not Available to Enjoin Such Violations As to All Citizens and Petitioners Were Denied the Equal Protection of the Laws.

The injunctive order is invalid as equity will not intervene where there is an adequate remedy at law and equitable relief is improper to enjoin the commission of a crime where there is no immediate and irreparable injury to public property. As a result of such issuance, the Indian petitioners were denied equal protection of the laws guaranteed to them by Amendment XIV, Section 1 of the United States Constitution.

The State of Washington failed in *State v. Satiacum*, 50 Wn.2d 524, 314 P.2d 400 (1957) in its criminal prosecution of members of the Puyallup Indian Tribe for violation of state game and food fish statutes and regulations. It failed for the reason that an accused person in a criminal case has certain basic legal and procedural safeguards, not the least of which affords him the presumption of innocence until proven guilty. This presumption casts the burden of proof upon the prosecution to prove its case by a preponderance of the evidence. In *State v. Satiacum, supra*, the State of Washington found this burden unbearable.

To avoid the difficulty of carrying its burden of proof and to strip the Indian petitioners of their legal safeguards in a situation where the State has an adequate remedy

at law, i.e. enforcement against violation of its fishing laws and regulations by criminal prosecution, the state was permitted by the court below to bring an injunctive action in equity, which stripped from petitioners their legal safeguards of protection as accused persons and placed upon them the burden of proving their innocence. The State on the other hand was relieved of its burden of proving the guilt of petitioners.

Equity will not intervene by way of injunction where there is an adequate remedy at law and injunctive relief will not issue to stay the commission of a crime. The reason for this rule is succinctly state in *Prosser on Torts* (Hornbook Series 1941 Edition) on page 590 as follows: "As to public nuisance, the remedy by injunction may exist in favor of the state, but its use is somewhat complicated by the *traditional rule that equity will not enjoin a crime as such, where the effect will be to deprive the defendant of his constitutional safeguards.* A private individual may obtain an injunction against a public nuisance only if he can show special damage to himself, distinct from the invasion of the public interest." Cases there cited. (Emphasis supplied)

The exception to the rule that equity will not enjoin a criminal violation where public property rights or interest are affected has no application to the instant case. There is no showing in the record of probable immediate and irreparable damage to public property. The respondents waited nearly a century before bringing an action to dispute the reserved tribal fishing rights of appellants and after failure in that action, *State v. Satiacum*, 50 Wn.2d 524, 314 P.2d 400 (1957), waited for eight

years longer before bringing the instant action. The *sub silento* conduct of respondents over this span of eight years constituted an admission that there was no immediate danger to or risk of irreparable damages to public property involved.

The trial court on page 22 of its Memorandum Decision found that appellants' exercise of tribal fishing rights amounted to only about three percent to five percent (3% to 5%) of the total catch. It is submitted that there is not only no showing of immediacy or irreparable harm to public property, but that respondent departments' conduct and their own records indicate the contrary to be the case.

The respondent departments have adequate remedies at law as evidenced by the host to foodfish and game fish sanctions set forth in Titles 75 and 77 R.C.W. and the cases they have brought to enforce them as to rights protected by Indian Treaties with the federal government.

Appellants respectfully invite the court's attention to page 703 of *Veterans of Foreign Wars v. Sweeney* (Ohio), 111 N.E. 699 (1916) from which we quote:

> "The Constitution and laws of the State have provided the means of protecting the rights of the citizen against his officials by adjudication of them in the courts under formal charge. This is not over-simplifying the situation because the process is simple, thoroughly established as well as protected by time, is fully protective of the rights of free citizens and can well be said to be a part of the genius of democratic functioning."

See also *People v. Fritz*, 316 Ill.App. 217, 45 N.E.2d 48 (1942) and *State ex rel. Department of Public Works v. Skagit River Navigation Co.*, 181 Wash. 642, 45 Pac. 27.

The petitioners have been denied their Constitutional right to equal protection of the laws by the bringing of this unprecedented action against them as nowhere throughout the food fish and game fish laws of this State is provision made for enjoining the future conduct or courses of conduct of non-Indians regarding violations of these statutory regulations. By not so providing, the legislature of the State of Washington did not remove from the protection of its citizens the basic legal, procedural and constitutional safeguards all citizens have when accused of violating a criminal law by allowing courts of equity to issue injunctive orders against a future course of conduct involving fishing laws with enforcement by imprisonment for contempt of court. The Indian appellants are citizens also and are entitled to the same protective safeguards of the laws as non-Indian citizens under Amendment XIV, Section 1 of the United States Constitution. *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1947).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed, except the portion thereof ruling that the trial court had no jurisdiction to determine whether or not there had been a termination of the Puyallup Indian Tribe.

Respectfully submitted,

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